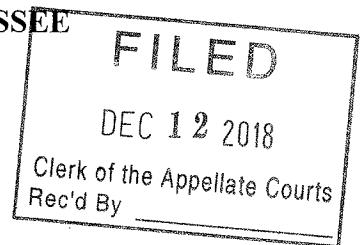


IN THE SUPREME COURT FOR THE STATE OF TENNESSEE
AT NASHVILLE



SCRIPPS MEDIA, INC. and
PHIL WILLIAMS,

Petitioners,

v.

TENNESSEE DEPARTMENT OF
MENTAL HEALTH AND SUBSTANCE
ABUSE SERVICES and TENNESSEE
BUREAU OF INVESTIGATION,

Respondents.

)
)
)
)
)
)
)
)
)
)
)
)
)
)
)
)

MOTION TO ASSUME JURISDICTION

Petitioners Scripps Media, Inc. and Phil Williams, pursuant to Tennessee Code Annotated § 16-3-201(d) and Rule 48 of the Rules of the Supreme Court of the State of Tennessee, hereby petition this Court to assume jurisdiction over this case that is currently pending in the Court of Appeals. This is a case of unusual public importance in which there is a substantial special need for an expedited decision.

The appeal involves important statutory and constitutional rights that will be negatively impacted unless and until this Court takes action to overturn or clarify the overly broad interpretation of its prior decision that was accepted by the trial court in this case. For the reasons stated hereinafter, Petitioners ask this Court to assume jurisdiction over this appeal and decide this important issue of public concern on an expedited basis.

I. QUESTION PRESENTED FOR REVIEW

CAN STATE OFFICIALS PROPERLY DENY ACCESS TO NON-INVESTIGATIVE PUBLIC RECORDS SIMPLY BECAUSE SUCH RECORDS SUBSEQUENTLY BECOME RELEVANT TO A CRIMINAL INVESTIGATION?

II. STATEMENT OF RELEVANT FACTS

Petitioners Scripps Media, Inc. and Phil Williams have appealed the denial of their Petition for Access to Public Records that sought to obtain certain public records of the Tennessee Department of Mental Health and Substance Abuse Services (“TDMHSAS”) and the Tennessee Bureau of Investigation (“TBI”). Petitioner Phil Williams is the Chief Investigative Reporter for NewsChannel 5-WTVF, a television station in Nashville, Tennessee that is owned and operated by Petitioner Scripps Media, Inc.

Beginning on June 15, 2018, Petitioner Williams sent written requests to the TBI and TDMHSAS seeking access to travel reimbursement requests, per diem requests, phone call logs, and e-mail relating to then acting TBI director Jason Locke and another state employee Sejal West (TDMHSAS). Exhibits A and E to Petition for Access. Mr. Williams followed up with subsequent written requests for access to the electronic calendars and other records of these state employees. Exhibits B, C, D, F, and G to Petition for Access.

Mr. Williams’ requests for access to these public records were denied by the State Attorney General’s office on the grounds that there was an “open and ongoing criminal investigation” by the local District Attorney concerning the activities of these two State employees. Exhibits K and L to Petition for Access. The State relied upon this Court’s prior opinion in *Tennessean v. Metropolitan Government of Nashville and Davidson County, Tennessee*, 485 S.W.3d 857 (Tenn. 2016) (hereinafter “*Tennessean case*”) for its denial. *Id.*

It is undisputed that the requested public records had been created in the ordinary course of the regular business of these two state agencies. They were not investigative records, as they were created well before any investigation was begun or contemplated by anyone.

After further attempts at obtaining these records failed, Petitioners filed their Petition for Access to Public Records (“Petition”) in the Chancery Court for Davidson County, Tennessee pursuant to Tennessee Code Annotated § 10-7-505. The Petition filed on July 31, 2018, was verified by Petitioner Williams and had as exhibits, each of Mr. Williams’ records requests and each of the State’s responses. Immediately prior to the date for the scheduled hearing on the Petition (two months after the documents were initially requested), the State declared that the investigation was over and the requested documents would be produced. The State agencies, as Respondents, subsequently filed their Response to the Petition and argued that the case was moot because documents had now been produced. As to the merits of the Petition, the State relied upon the *Tennessean* case, claiming the records did not have to be provided because they were relevant to an ongoing investigation.

The State’s Response to the Petition included e-mails sent to the State from Mr. Locke’s wife on June 15 to Governor Haslam that the State argues caused him to request an investigation of Mr. Locke. There was no further documentary material submitted with the State’s Response regarding any subsequent investigation. The State submitted no additional evidence as to when such an investigation actually began or that the requested records were part of any investigative file at the time of Petitioners’ request.

On September 19, 2018, the Davidson County Chancery Court held a hearing on Petitioner’s Petition. On October 8, 2018, that Court entered its Memorandum and Order (“Order”). The Court found the “public interest” exception to the mootness doctrine applied to

this case and, therefore, it would decide the Petition on the merits. Order at 3, 8, 13. On the merits of the Petition, the Court upheld the State’s denial of access based upon the *Tennessean* case. Order at 13-14. The Court held that “even though the records at issue are not of the same nature or character as the records sought in *Tennessean*, the Court’s intention in *Tennessean* appears to be for a broad application of the Rule 16 exemption to protect any documents in an investigative file from disclosure.” *Id.* at 13.

On November 5, 2018, Petitioners filed a Notice of Appeal of the Order with the Court of Appeals. That appeal is still pending, and it does not appear that the record has yet been sent to the Court of Appeals. A copy of the Order appealed from is attached to this Motion.

III. REASONS FOR ASSUMING JURISDICTION

Tennessee Code Annotated § 16-3-201(d) specifically provides that this Court may assume jurisdiction in a case of “unusual public importance” in which there is a “special need for expedited decision.” The statute also states that this provision applies to cases that “involve” either “state taxes,” “the right to hold or retain public office,” or “issues of constitutional law.”

The issue in this case is the State of Tennessee’s current broad interpretation of a judicially created exception to the public records laws in Tennessee. The State’s justification for denial of access, which the lower court relied upon, involved “the constitutional rights of criminal defendants.” Order at 12. The State’s action to broadly deny disclosure of public records in this manner negatively impacts the constitutionally guaranteed rights of free speech and free press guaranteed by the First Amendment to the United States Constitution and Article I § 19 of the Tennessee Constitution. Such “involvement” of constitutional rights places this case within the category of cases that supports the assumption of jurisdiction by this Court.

This case is particularly suited for the direct assumption of jurisdiction by this Court because it involves an issue of compelling public interest and urgency and because it involves a broad expansive interpretation of a recent ruling of this Court. The lower court in this case relied upon what it admitted was a “broad reading” of the Rule 16 exemption from this Court’s ruling in *Tennessean v. Metropolitan Government of Nashville and Davidson County, Tennessee*, 485 S.W.3d 857 (Tenn. 2016). Order at 14.

It is undisputed that the records sought by Petitioners in this case were “public records” within the meaning of Tennessee Code Annotated § 10-7-503(a)(1). Order at 13. The statute that provides for public access to public records states that the records shall be open for inspection and that the right of inspection shall not be denied “unless otherwise provided by state law.” Tenn. Code Ann. § 10-7-503(a)(2).

The State of Tennessee relied upon this Court’s opinion in the *Tennessean* case to deny access to the public records requested by Petitioners. The State claimed that the records sought had become “relevant to and involved in a pending criminal investigation coordinated by the District Attorney General.” Exhibit P to Petition for Access. The prior case law that the State has relied upon herein, including the *Tennessean* case, dealt with factual situations wherein the media or a criminal defense attorney made their record requests directly to a police department or another law enforcement agency for items that were already in the law enforcement agencies’ investigative files, including investigators’ notes, witness interviews, and other items created during the course of pending criminal cases. This Court’s holding in the *Tennessean* case relied upon Rule 16 of the Rules of Criminal Procedure governing discovery in a pending criminal case. That opinion is what the State and the lower court relied upon in denying access to the records requested by Petitioners. Order at 11, 13.

In this current case however, the records that Petitioners sought were not “investigative records” within the meaning of the *Tennessean* case or prior case law. It is undisputed that the public records at issue herein were created in the ordinary course of the two state agencies’ regular business. These public records were not generated or prepared in connection with any investigation. They were created well before any investigation regarding the two state employees was contemplated or begun.

The scope and timing of the requests in this case were also materially different from the *Tennessean* case and the prior case law cited by the State. In those cases, criminal cases were already actually pending, the requested records had been created during an investigation of the alleged crimes, the records were actually in law enforcement files, and perhaps most importantly the public records requests had been made directly to the law enforcement agency seeking what was in their investigative files. None of those facts existed in this current case.

The argument that the State made for denying access to these records is an unwarranted and substantial expansion of this Court’s decision in the *Tennessean* case. The public records sought herein are not criminal discovery documents and Rule 16 of the Tennessee Rules of Criminal Procedure should have no application. The rationale for denying access in the *Tennessean* case does not apply in this case.

In its Order, the lower court did recognize the material factual differences between this case and other cases but still upheld the denial, expressly relying upon the ruling in the *Tennessean* case. Order at 13, 14. The court stated that “even though the records are not of the same nature or character as the records sought in *Tennessean*, the court’s intention in *Tennessean* appears to be for a broad application of the Rule 16 exemption to protect any documents in any investigative file from disclosure.” Order at 13. The court also stated that “Although the facts of the *Tennessean*

case are different from those in the present case, the court is persuaded, based upon its reading of the lower court decisions in the context of the Tennessee Court’s decision, that it must give broad reading to the Rule 16 exemption.” Order at 14.

Thus, despite its clear recognition that there were significant factual differences from the *Tennessean* case and prior case law, the lower court believed this Court’s prior opinion should be given a “broad reading” or “broad application” sufficient to cover even these non-investigative public records. It is most appropriate and also necessary for this Court to resolve the issue about whether it was in fact this Court’s “intention” for such a broad application of its prior ruling.

This Court needs to review this ruling as soon as practicable. Constitutional rights are “involved” (as required by the jurisdiction statute) and are certainly impacted by the decision in this case. As specifically pointed out by the Court in its Order, “The State relies upon the importance of the constitutional rights of criminal defendants.” Order at 12. The lower court quoted language from the *Tennessean* case that the ruling in that case relied upon “the need to protect the rights of defendants accused of crimes and the integrity of the criminal justice system during the pendency of criminal cases and any collateral challenges to criminal convictions.” Order at 14, citing *Tennessean*, 485 S.W. 3d at 874.

The lower court opinion pointed to the constitutional rights of criminal defendants as a basis for upholding a blanket denial of access to such public records. Petitioners submit that the constitutional rights of criminal defendants, particularly at this early stage of an investigation, do not require such a broad denial of access to these public records. The lower court did not properly balance the competing constitutional right of freedom of the press with the constitutional rights of criminal defendants as required by such cases as *Nebraska Press Association v. Stuart*, 427 U.S. 539 (1976).

Constitutional rights are “involved” in this case because the restrictions negatively impact the freedom of press guarantees found the First Amendment to the United States Constitution and Article I, § 19 of the Tennessee Constitution. Article I, § 19 of the Tennessee Constitution specifically provides:

That the printing presses shall be free to every person to examine the proceedings of the Legislature; or of any branch or officer of the government and no law shall ever be made to restrain the right thereof.

This Court’s opinion in *Press, Inc. v. Verran* stated that this provision can be viewed in some contexts as a “substantially stronger” provision than contained in the First Amendment to the United States Constitution. 569 S.W.2d 435, 442 (1978). In that case, this Court also stated, “the news media have not only a right but a duty to make searching inquiry into all phases of official conduct and to realistically evaluate and access the performance of duty by public officials.” *Id.* at 442. The action by state officials to block access to otherwise producable public records restrains that constitutional right.

As previously stated, the position accepted by the lower court in this case is a substantial and unwarranted expansion of this Court’s opinion in the *Tennessean* case and prior Tennessee case law. It is contrary to the legislature’s stated intent that the open records act “shall be broadly construed so as to give the fullest possible public access to public records.” Tenn. Code Ann. § 10-7-505(d). As stated, it also undercuts and restrains the exercise of the constitutionally guaranteed rights of free speech and free press.

This case is of unusual public importance because of the restriction that the current ruling will have on future public records requests and the resulting denials of access that are certain to occur if the State’s current position is not rejected. State and local officials can use this broad interpretation of the *Tennessean* case to deny access to the media and public by simply claiming

the public records sought have possible relevance to an investigation. Such denials of access would block or substantially restrict the public's ability to learn about possible public corruption and the way public officials are performing their jobs.

In its holding that the “public interest” exception to the mootness doctrine applied, the lower court specifically “finds the present issue regarding public records disclosure to be one of great public importance.” Order at 6. In *Webber v. Bolling*, 1989 WL 151496 (Tenn. App. 1989), the Court of Appeals stated [also on a mootness argument] that:

We believe that this matter regarding the accessibility of public records is a matter of great public concern and is of importance in the administration of justice.

At *2.

Under the State’s and lower court’s current broad interpretation of this Court’s ruling in the *Tennessean* case, non-investigative records prepared in the ordinary course of business of non-law enforcement agencies can subsequently be transformed into “investigative records” by a claim that they may be relevant to an on-going investigation. As demonstrated in this case, the claim of “investigative records” by state officials can occur a substantial time after the records are created. Such a designation can be made at the very time, or possibly even after, a public records request is made. The potential for abuse by using a post-request designation of “investigative records” to block disclosure is evident and a substantial continued risk. See *Chattanooga Publishing Company v. Hamilton County Election Commission*, 2003 WL 22469808 (Tenn. App. 2003).

In this case there was no proof that the requested records were in any investigative file at the time requested – or for that matter even after the request. The State only produced e-mails from a citizen, dated the same day as Petitioners’ first public records request, that had been sent to State officials and which then allegedly caused a request for an investigation into Mr. Locke’s and Ms. West’s conduct.

There is a great need for an expedited decision on this appeal, because this broad interpretation of the *Tennessean* case will continue to be used as a reason to deny public and media access to public records until it is corrected or clarified. This is not a theoretical or hypothetical possibility, it is certain to occur. As the lower court found, “this question is likely to arise again, since allegations of public officials acting contrary to law are, unfortunately, an ongoing dilemma in modern society.” Order at 16. There will obviously be continuing public and media requests for public records, and with the State’s or local government’s ability to rely upon this broad interpretation of the *Tennessean* case, there will be delays or denials of meaningful review of public records.

Reliance upon this broad interpretation of this Court’s prior opinion will result in a denial of access to public records that otherwise would be required. State and local governments will continue to rely upon this argument until there is a review by this Court. It is urgent that this Court assume jurisdiction of this case and reject and/or clarify this overly broad interpretation of its prior opinion. Going through the process of having the Court of Appeals first hear this issue will result in a delay that will undoubtedly cause more denials of access and more unwarranted restrictions of constitutional and statutory rights until such issue is definitively decided by this Court.

IV. RELIEF SOUGHT

Petitioners herein respectfully ask this Court to assume jurisdiction over this case pursuant to Tennessee Code Annotated § 16-3-201(d) and that the Court set an expedited schedule for transmission of the record, submission of briefs, and oral argument.

In the alternative, if this Court decides that this motion should not be granted, Petitioners ask that the Court, on its own motion, assume jurisdiction over this case pursuant to Tennessee Code Annotated § 16-3-201(d)(3) as it is a case of compelling public interest.

Petitioners ask this Court to hear the merits of Petitioners' appeal, reverse the lower court's decision and declare that access to public records created and maintained in the ordinary course of a government agency's business cannot be denied simply because the records may subsequently become relevant to a criminal investigation.

Petitioners request that the costs of this appeal be taxed to the Respondents and for all other further and general relief to which they may prove themselves entitled upon the hearing of this case.

Respectfully submitted,

NEAL & HARWELL, PLC

By: 
Ronald G. Harris, #9954
William J. Harbison II, #33330
1201 Demonbreun Street, Ste. 1000
Nashville, TN 37203
(615) 244-1713 – Telephone
(615) 726-0573 – Facsimile
Counsel for Petitioners

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been served, via the method(s) indicated below, on the following counsel of record, this the 12th day of December, 2018.

(<input type="checkbox"/>) Hand	Janet M. Kleinfelter, Esq.
(<input checked="" type="checkbox"/>) Mail	Deputy Attorney General
(<input type="checkbox"/>) Fax	301 Sixth Avenue North
(<input type="checkbox"/>) Fed. Ex.	P.O. Box 20207
(<input checked="" type="checkbox"/>) E-Mail	Nashville, TN 37202



A handwritten signature in black ink, appearing to read "Janet M. Kleinfelter", is written over a horizontal line.

ORDER - 10/08/18

IN THE CHANCERY COURT FOR THE STATE OF TENNESSEE
TWENTIETH JUDICIAL DISTRICT, DAVIDSON COUNTY, PART II

SCRIPPS MEDIA, INC. and PHIL
WILLIAMS,
Petitioners,
v.
TENNESSEE DEPARTMENT OF
MENTAL HEALTH AND SUBSTANCE
ABUSE SERVICES and TENNESSEE
BUREAU OF INVESTIGATION,
Respondents.

)
)
)
)
)
)
)
)
)
)
)
)
)
)
)
)
)
)
)
)

F.O.-6
No. 18-835-II
TT

2018 OCT - 8 PM 3:14
CLERK'S MISTER
DAVIDSON CHANCERY CT.
RECEIVED
M
DCRM

MEMORANDUM AND ORDER

This matter came before the Court upon the Petition for Access to Public Records filed by Petitioners Scripps Media, Inc. and Phil Williams (“Petitioners”), pursuant to the Tennessee Public Records Act, Tenn. Code Ann. § 10-7-101 et seq. (“the Act”). On June 15, 18-22, 2018, the Petitioners sought access to certain public records maintained by the Tennessee Department of Mental Health and Substance Abuse Services (“TDMHSAS”) and the Tennessee Bureau of Investigation (“TBI”) (collectively the “State” and the “Requests”). The State timely responded to the Requests on June 22, 2018, as required by Tenn. Code Ann. § 10-7-503(a)(2)(B), citing the Act’s exemption for public records that are “otherwise provided by state law.”¹

Tennessee courts have held that Tennessee Rule of Criminal Procedure 16 (“Rule 16”) may constitute a “state law” exemption to certain requests made under the Act. *Appman*

¹ The Act provides in pertinent part that “[a]ll state, county and municipal records shall, at all times during business hours . . . be open for personal inspection by any citizen of this state, and those in charge of the records shall not refuse such right of inspection to any citizen, unless otherwise provided by state law.” Tenn. Code Ann. § 10-7-503(a)(2)(A).

v. Worthington, 746 S.W.2d 165 (Tenn. 1987); *Swift v. Campbell*, 159 S.W.3d 565 (Tenn. Ct. App. 2004). Most recently, in *The Tennessean v. Metropolitan Gov't of Nashville and Davidson County*, 485 S.W.3d 857 (Tenn. 2016), the Tennessee Supreme Court interpreted Rule 16 as exempting from disclosure records arising out of, or part of, a contemplated or pending prosecution or a collateral challenge to any conviction, even if the records originated from a third party source and were not law enforcement work product. *Id.* at 859.

In the present case, the Requests were made to the State agencies that produced and maintained the subject records in the ordinary course of business, and not as part of a criminal investigation. Moreover, the records were not requested because they were part of an investigative file, but rather as normal business records. At some point prior to or simultaneously with the Requests, the State initiated an investigation into the conduct of the two employees whose records were sought. The State takes the position that, when the investigation commenced, the records became cloaked by the Rule 16 exemption. Petitioners assert that the nature of the records at the time of their creation, which was prior to an investigation, is controlling and that the records are therefore subject to disclosure under the Act.

The question before the Court is whether the *Tennessean* case is sufficiently analogous to the present case, or whether its finding can be construed with such breadth, so as to support the State's position. Before making such a determination, however, the Court must discern whether the controversy is moot given the State has since provided the requested documents. Specifically, the Court must decide whether it is in the public interest to adjudicate this matter in spite of the resolution of the Petitioners' records request. And finally, if the Court finds in favor of the Petitioners, i.e., that this matter is not moot, then the

Court must determine whether the State acted willfully in denying the Requests and is thus liable to the Petitioners for attorney's fees under Tenn. Code Ann. § 10-7-505(g).

For the reasons set forth herein, the Court finds that there is a sufficient public interest in the subject legal controversy to make a finding on the merits, despite the Requests having been satisfied. The Court further finds that the holding in *Tennessean* mandates a broad protection for documents in the possession of an investigative agency relevant to a pending or contemplated criminal action, even if the documents originated from another State agency and were created in the ordinary course of business. Given that finding, the issue of the willfulness of the State's refusal to provide the requested records is moot.

FACTS

The facts in this matter are substantially undisputed. The Petitioners initiated the Requests via e-mail on the afternoon of Friday, June 15, 2018 regarding two State employees, Sejal West and Jason Locke, who worked for the TDMHSAS and TBI. Subsequent requests were made to each agency over the following five business days. The Requests were for the following:

To TDMHSAS on June 15, 2018:

- All travel reimbursement and per diem requests submitted by Sejal West since November 2016;
- All logs of phone calls made on any mobile phone assigned to Ms. West since November 2016;
- Any e-mails between Ms. West and Jason Locke of the Tennessee Bureau of Investigation.

To TBI on June 15, 2018:

- All travel reimbursement and per diem requests submitted by Jason Locke since November 2016;
- All logs of phone calls made on any mobile phone assigned to Mr. Locke since November 2016;
- Any e-mails between Mr. Locke and Sejal West of the Department of Health.

To TDMHSAS on June 18, 2018:

- Ms. West's electronic calendar since November 2016.

To TBI on June 18, 2018:

- The electronic calendars for Jason Locke for the same time period [since November 2016].

To TDMHSAS on June 19, 2018:

- Any items in Sejal West's personnel file—or in any other file kept by the Commissioner or her designee—regarding Ms. West's resignation back in January. This request includes, but is not limited to, any complaints, any disciplinary letters/memos, any investigative summaries and any resignation letter/e-mail.

To TDMHSAS on June 20, 2018:

- Any e-mail or other written communication related to Ms. West's job status and whether she was placed on administrative leave.

To TBI on June 21, 2018:

- Transaction summaries since July 2, 2016 for any credit cards or p-cards that may have been assigned to Jason Locke.

To TBI on June 22, 2018:

- Any text messages between Jason Locke and Sejal West.

It appears that on June 15, 2018, when the first Requests were made, Mr. Locke's wife contacted the State, through Governor Haslam, to communicate her belief that the above-named employees were engaged in an extra-marital affair using public resources. The same day, the State initiated an investigation into the employees' conduct and the Petitioners made the Requests.

On June 22, 2018, the State timely responded to the Requests, denying them pursuant to the Act's state law exemption under Rule 16 and the *Tennessean* case. Specifically, the State asserted that the subject records concerned ongoing investigations into the conduct of Ms. West and Mr. Locke by the District Attorney General for the 20th Judicial District. The Petitioners filed the present action in the Davidson County Chancery Court on July 31, 2018

seeking release of the records. Injunctive proceedings were rendered moot when, on August 10, 2018, the Davidson County Grand Jury declined to return an indictment of either Jason Locke or Sejal West. The State thus determined the subject records were no longer part of a pending or contemplated criminal investigation and provided them to Petitioners on August 14 and 15, 2018.

Despite having received the requested records, the Petitioners seek relief from the Court based upon two arguments:

- (i) the Court should rule on the now moot question of law because the underlying issues are of great public concern; and,
- (ii) the Petitioners are entitled to attorneys' fees because the State's refusal to provide the requested records was willful.

The Petitioners also continue to assert the requested records are not covered by the Rule 16 exemption and should have been provided upon receipt of the Requests.

LEGAL ANALYSIS

Mootness Doctrine

It is well settled that Tennessee courts are only to decide legal controversies between parties with "real and adverse interests" and not act as an advisor on abstract matters. *Norma Faye Pyles Lynch Family Purpose LLC v. Putnam County*, 301 S.W.3d 196, 203 (Tenn. 2009). A case becomes moot when it "has lost its justiciability either by court decision, acts of the parties, or some other reason occurring after commencement of the case." *Id.* at 204.

In *Norma Faye Pyles Lynch*, the Tennessee Supreme Court set forth an analytical model for determining when the above "mootness doctrine" did not preclude judicial review. This model was also used by a specially formed panel of the Supreme Court in *Hooker v.*

Haslam, 437 S.W.3d 409, 417-18 (Tenn. 2014). In both cases, the Court looked to the following criteria in determining whether the circumstances of the case warranted an exception to the mootness doctrine:

- (1) when the issue is of great public importance or affects the administration of justice,
- (2) when the challenged conduct is capable of repetition and of such short duration² that it will evade judicial review,
- (3) when the primary subject of the dispute has become moot but collateral consequences to one of the parties remain; and
- (4) when the defendant voluntarily stops engaging in the challenged conduct.³

Norma Faye Pyles Lynch, 301 S.W.3d at 204 (citations omitted); *Hooker*, 437 S.W.3d at 417-18.

The Court finds the present issue regarding public records disclosure to be one of great public importance. The right to review records is a codification of the “public access doctrine” recognized as a general right of citizens. *Ballard v. Herzke*, 924 S.W.2d 652, 661 (Tenn. 1996). While the State properly asserted that the right to review records is statutory, not constitutional, the issue nevertheless requires resolution and clarification for future requests. Moreover, this question is likely to arise again, since allegations of public officials acting contrary to the law are, unfortunately, an ongoing dilemma in modern society. This likelihood that news organizations, private citizens, et al. will continue seeking access to public information must be considered in assessing mootness.

² In regard to the time it took for fulfillment of the Requests, the Court notes that the speedy resolution of the criminal claims in this case may not be typical, e.g., the criminal investigation in *Tennessean* took substantially longer to resolve. In the present case, before this matter could be adjudicated, the grand jury had returned a decision not to indict the subject employees, which prevented the Petitioners from fully pursuing their claims.

³ The burden of persuasion would typically be on the government entity arguing mootness; however, the burden shifts to the petitioner if the government has ceased withholding records on its own accord. *Norma Faye Pyles Lynch*, 301 S.W.3d at 206 (citations omitted). It is undisputed that the State provided the records at issue, albeit because of a change in circumstances, not because of a reversal of position. Here, the State turned over the requested records after there was no criminal indictment returned as to Ms. West and Mr. Locke. The government’s capitulation was a function of timing, not a change in position. Thus, the State has the burden of persuasion that the issue is moot.

In light of the Court's finding that the public interest exception to mootness potentially applies in this case, the Court turns to the four-pronged analysis laid out in *Norma Faye Pyles Lynch* and *Hooker* to determine whether the Court should exercise its discretion and decide the issues presented here on this basis. Under that analysis, the Court must address the following threshold considerations: (1) whether the rights and claims are personal to the parties, (2) whether the issue is of significant importance to the public and the administration of justice generally, (3) whether the situation is likely to arise in the future, and (4) whether the record is sufficiently accurate regarding what occurred. *Norma Faye Pyles Lynch*, 301 S.W.3d at 210-11 (citations omitted); *Hooker*, 437 S.W.3d at 418.

The first three factors in the above test support a finding that the Court should apply the public interest exception to the mootness doctrine. In regard to whether the record is sufficiently accurate as to the events underlying the Petitioners' Request, the uncertainty here lies in whether the Requests were made before or after Governor Haslam initiated the investigation. The parties assert, and the Court agrees, that such a technicality is not controlling in this case. Instead, the key issue is whether the public records at issue changed character prior to the deadline for their disclosure.

Finally, the *Norma Faye Pyles Lynch* and *Hooker* analysis requires that the Court balance the interests of the parties before determining whether the public interest exception overrides the mootness doctrine. The Court must address: (1) whether a finding will assist public officials in performing their duties, (2) whether the situation is likely to reoccur, (3) the degree of urgency, (4) the costs and difficulties of relitigating the same issue, and (5) whether the issue is one of law, a mixed question of law and fact, or heavily fact-dependant. *Norma Faye Pyles Lynch*, 301 S.W.3d at 211 (citations omitted); *Hooker*, 437 S.W.3d at

418. The first two factors are more applicable than the third and fourth factors, since this case has been short lived, and there is no actual urgency given the records have been provided. That said, clarity in the law regarding public record disclosure obligations is much needed, due to the intrinsic importance of transparency in government and the frequency of such requests. As discussed above, it is likely this issue will arise again. Finally, in regard to the fifth factor, the issue as to which records are cloaked with a Rule 16 exemption necessarily involves questions such as who created the records, when did they create them, who seeks access to them, and from whom is access sought. However, the issue itself is a legal one.

For all of the reasons set forth above, with primary reliance on *Norma Faye Pyles Lynch* and *Hooker*, the Court finds that the public interest exemption to the mootness doctrine applies in the present case. Therefore, the Court must rule on the underlying issue of whether the requested records were exempted from disclosure by Rule 16.

Rule 16 Exemption to Public Records Act

The State must prove the records requested are exempt from disclosure under the Act by a preponderance of evidence. Tenn. Code Ann. § 10-7-505(c). The controlling case on this issue is *Tennessean*, decided by the Tennessee Supreme Court just two years ago. In *Tennessean*, the Court thoroughly reviews the history of the Act and public records issues in general. 485 S.W.3d at 864-66.

The right of citizens to access the State's public records was codified in the Act in 1957. *Id.* at 864. "The Public Records Act has been amended over the years, but its intent has remained the same—to facilitate the public's access to government records." *Id.* at 864

(citing *Swift v. Campbell*, 159 S.W.3d 565, 571 (Tenn. Ct. App. 2004)). The Act states as follows:

[A]ll documents, papers, letters, maps, books, photographs, microfilms, electronic data processing files and output, films, sound recordings or other material, regardless of physical form or characteristics, made or received pursuant to law or ordinance or in connection with the transaction of official business by any governmental agency.

Id. citing Tenn. Code Ann. § 10-7-503(a)(1)(A). There is a “presumption of openness to records of government entities.” *Id.* (citing *Memphis Publ'g Co. v. City of Memphis*, 871 S.W.2d 681, 684 (Tenn. 1994)).

The exceptions to the Act are also detailed in *Tennessean*. Originally there were two categories of exceptions—medical records of patients in state hospitals and military records related to national or state security. *Tennessean*, 485 S.W.3d at 865. Over time, the Tennessee Legislature has amended that list and there are now forty exceptions, including a catch-all exception for circumstances “provided by state law” including “statutes, the Tennessee Constitution, the common law, rules of court, and administrative rules and regulations.” *Id.* at 865-66 (citing *Swift*, 159 S.W.3d at 571-72).

Rule 16, which sets out the discovery guidelines for the State and defendants in criminal proceedings, is among the procedural rules of court that has been recognized as exempting certain materials from requests under the Act. For instance, 16(a)(1) lists what the State must provide to a defendant in discovery, and (a)(2) exempts from disclosure work product materials. The *Tennessean* Court summarized the line of cases interpreting the breadth and application of Rule 16 exemptions in public records matters. *Id.* at 866-70. These cases generally involved requests to law enforcement agencies for materials in their files. *Id.* at 868-870. In *Memphis Publishing Co. v. Holt*, 710 S.W.2d 513 (Tenn. 1986), the

media requested closed case files from a local law enforcement agency. The Tennessee Supreme Court found those records were subject to disclosure. In *Appman v. Worthington*, the requested records were Department of Correction “memoranda, documents and records” that were “the results of the investigation by Internal Affairs” of a death at a state run facility. 746 S.W.2d at 166-67. The Court found the records to be “the result of the investigation” and “relevant to the prosecution of the . . . offenses arising out of the [inmate’s] murder.” *Id.* at 167.⁴ Other cases reviewed involved requests for records shielded by a protective order in a civil case and requests for records in a criminal case where post-conviction relief was still being sought - both of which categories were determined to be protected. *Tennessean*, 485 S.W.3d at 869-70 (*citing Ballard v. Herzke*, 925 S.W.2d at 661 and *Swift*, 159 S.W.3d at 575-76).

Finally, in the most recent applicable Tennessee Supreme Court case prior to *Tennessean*, a request for police officers’ field interview cards was remanded to the trial court for a determination of which interview cards related to ongoing criminal investigations and which ones did not. *Schneider v. City of Jackson*, 226 S.W.3d 332, 334 (Tenn. 2007). The Court expressed clear concern about allowing the release of records developed as part of current criminal investigations, but found that the trial court failed to fully develop a record to identify those particular records. *Tennessean*, 485 S.W.3d at 870 (*citing Schneider*, 226 S.W.3d at 345-46).

The above-referenced cases formed the backdrop to the issue in *Tennessean*, which was “whether the Public Records Act applies to allow public access to investigative records that arise out of and are part of a criminal investigation resulting in a pending prosecution,

⁴ See discussion in *Tennessean*, 485 S.W.3d at 868-89.

are not the work product of law enforcement under Rule 16(a)(2), were gathered by law enforcement from other sources in their investigation of the case, and are requested by entities that are not parties to the pending criminal case.” *Tennessean*, 485 S.W.3d at 870. The *Tennessean* Court found that “Rule 16 does not provide for disclosure to a third party of materials subject to discovery between the State and a defendant during the pendency of the criminal case or any collateral challenges to the criminal conviction, [and] the Petitioners cannot gain access to these materials under the Public Records Act, even though the materials may fall outside the substantive scope of Rule 16(a)(2).” *Id.* at 873.

The facts in *Tennessean* are similar to those in the present case, with several key differences. The records request in *Tennessean* was made to the Metropolitan Police Department, a criminal investigative agency. Additionally, the records request included items prepared by a third party, namely Vanderbilt University, and not a law enforcement agency⁵ or other governmental entity. The trial court originally found that these records were subject to disclosure, stating that

records submitted to the Metropolitan Police Department that were not developed internally and that do not constitute statements or other documents reflecting the reconstructive and investigative efforts of the Metropolitan Police Department are outside the expansive reach of Tenn. R. Crim. P. 16(a)(2).

Davidson County Chancery Court Case No. 14-0156-IV at pg. 13-14 (Memorandum and Final Order, March 12, 2014). The trial court’s finding was not limited to documents from a third party to Metro, but rather any documents not created by the police department. *Id.* In reversing the trial court, the Court of Appeals held that the documents previously found to be subject to disclosure were “‘relevant to a pending or contemplated criminal action’ and

⁵ The list of documents originally requested was long and encompassed police department work product, including witness statements and forensic tests, as well as documents obtained from Vanderbilt. Davidson County Chancery Court Case No. 14-0156-IV at pg. 5-6 (Memorandum and Final Order, March 12, 2014).

therefore not subject to disclosure.” *Tennessean v. Metropolitan Government of Nashville and Davidson County, et. al.*, M2014-00524-COA-R3-CV, 2014 WL 4923162 at *4 (Tenn. Ct. App. Sept. 30, 2014).

The notable difference between the facts in *Tennessean* and the present case is that the requests were directed to non-investigative State agencies,⁶ and the records were developed and retained by those agencies in the ordinary course of business. They were not created for or through an investigation, but rather became part of the investigation after it was commenced. The State takes the position that the records changed in character when the investigation began and that, by becoming part of the investigation, they fell under the Rule 16 exception. Further, the State contends that it does not matter the nature of the records when they were created, but rather their nature when produced. The State relies on the importance of the constitutional rights of criminal defendants, as discussed in detail in *Tennessean*, as well as the public policy that parties should not be able to avoid the discovery rules in the Tennessee Rules of Criminal Procedure to obtain prosecutors’ files. *Tennessean*, 485 S.W.3d at 866-73.

The Petitioners take the opposite position—that the nature of the records when they were created is key, not whether they are subsequently provided to another agency as part of an investigation. They rely on *Chattanooga Pub. Co. v. Hamilton County Election Com’n*, E2003-00076-COA-R3-CV, 2003 WL 22469808 (Tenn. Ct. App. Oct. 31, 2003), where the facts are analogous to the facts in this case, i.e., the public records were provided to the investigative agency as a result of a criminal investigation subsequent to their creation. In *Chattanooga Pub Co.*, the Court of Appeals found that the nature of the records *at the time of*

⁶ The TBI is, of course, by its very nature an investigative agency, but the TBI records included in the Requests were operational, non-investigative records.

the request controlled how they were classified and whether the Rule 16 exemption applied. *Id.* at *1 and *4. While *Chattanooga Pub. Co.* could arguably be applied to find that the records requested in the present case are not subject to Rule 16 exemption, the more recent ruling in *Tennessean* militates against such a result. Even though the records sought in *Tennessean* were in the possession of the law enforcement agency *because of* an investigation, and the records in the present case were transferred to a law enforcement agency to *initiate* an investigation, the rule in *Tennessean* applies to documents in the possession of an investigative agency relevant to a pending or contemplated criminal action and affords those records blanket protection pursuant to Rule 16. Thus, even though the records at issue are still public records created “in connection with the transaction of official business by [a] governmental agency,” Tenn. Code Ann. §10-7-503(a)(1)(A), and even though the records are not of the same nature or character as the records sought in *Tennessean*, the Court’s intention in *Tennessean* appears to be for a broad application of the Rule 16 exemption to protect any documents in an investigative file from disclosure. Under this interpretation, the State acted properly in protecting the records from disclosure.

Willfulness

Because the State properly applied the Act to the Requests, the Petitioners assertions of willfulness are not well taken.

CONCLUSION

The Court finds that the public interest exception to the mootness doctrine, as set out by the Tennessee Supreme Court in *Norma Faye Pyles Lynch Family Purpose LLC v. Putnam County*, 301 S.W.3d 196 (Tenn. 2009) and reiterated in *Hooker v. Haslam*, 437

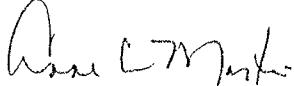
S.W.3d 409 (Tenn. 2014), applies to the present controversy. The Court thus has considered the merits of the subject Petition.

The Court further finds that the Rule 16 exemption to the Act applies in this case based upon the Tennessee Supreme Court's holding in *Tennessean*. In that case, the Court found that

[t]he media play an important and necessary role in holding government officials accountable. Yet, the General Assembly has rightly recognized that there must be exceptions to the public's right to obtain government records and, in doing so, have provided that the media's role must yield to the need to protect the rights of defendants accused of crimes and the integrity of the criminal justice system during the pendency of criminal cases and any collateral challenges to criminal convictions.

Tennessean, 485 S.W.3d 857, 874. Although the facts of the *Tennessean* case are different from those in the present case, the Court is persuaded, based upon its reading of the lower court decisions in the context of the Tennessee Supreme Court's decision, that it must give a broad reading to the Rule 16 exemption. Accordingly, the Petition for Access to Public Records is denied. As the State's refusal to provide the requested records was not willful, the Petitioners' request for attorneys' fees is denied. Costs are taxed to the Petitioner.

IT IS SO ORDERED.



ANNE C. MARTIN, CHANCELLOR
CHANCERY COURT PART II

cc: Ronald G. Harris
William J. Harbison II
Neal & Harwell, PLC
1201 Demonbreun Street, Suite 1000
Nashville, TN 37203

Janet M. Kleinfelter
Tennessee Attorney General's Office
P.O. Box 20207
Nashville, TN 37202-0207

RULE 58 CERTIFICATION

A Copy of this order has been served by U. S. Mail
upon all parties or their counsel named above.

MB
Deputy Clerk and Master
Chancery Court

10/8/18
Date

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

FILED
12/18/2018
Clerk of the
Appellate Courts

**SCRIPPS MEDIA, INC. ET AL. v. TENNESSEE DEPARTMENT OF
MENTAL HEALTH AND SUBSTANCE ABUSE SERVICES ET AL.**

**Chancery Court for Davidson County
No. 18-835-II**

No. M2018-02011-SC-RDM-CV

ORDER

On December 12, 2018, Plaintiffs, Scripps Media, Inc. and Phil Williams, filed in this Court a Motion to Assume Jurisdiction pursuant to Rule 48 of the Rules of the Tennessee Supreme Court and Tennessee Code Annotated section 16-3-201(d). Having carefully considered Plaintiffs' motion, the Court concludes that this case does not raise issues warranting the Court's exercise of its authority to assume jurisdiction and the motion is DENIED.

PER CURIAM